

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

Uriel Anderson,	:	
Plaintiff,	:	
	:	
v.	:	File No. 1:06-CV-144
	:	
Corrections Corporation of	:	
America, Warden Mills,	:	
Assistant Warden Hensley,	:	
Chief of Security Polk,	:	
Captain Walton, Captain	:	
Woodland, Captain Woods,	:	
Lieutenant Anderson,	:	
Captain Brooks, Unit	:	
Manager James Severs,	:	
Sergeant Bullock, Sergeant	:	
Hawkings, Steven Gold and	:	
Raymond Flum,	:	
Defendants.	:	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION  
(Paper 27)

Plaintiff Uriel Anderson, a Vermont inmate proceeding *pro se*, brings this action claiming unconstitutional treatment while in prison. In a previous ruling on a defendants' motion to dismiss, I recommended that the Court dismiss two of the defendants and transfer the remainder of the case to the Western District of Tennessee. While my Report and Recommendation was pending, the defendants filed a second motion to dismiss for failure to prosecute. For the reasons set forth below, I recommend that the second

motion to dismiss (Paper 27) be GRANTED, and that this case be dismissed if the plaintiff does not inform the Court within 60 days of his intent to proceed. If the plaintiff so informs the Court within that 60 day period, two defendants should be dismissed and the case should be transferred pursuant to my first Report and Recommendation.

Factual and Procedural Background

For purposes of the pending motions, the allegations in Anderson's complaint will be accepted as true. These facts were set forth in my previous Report and Recommendation, and are largely repeated here.

During the period of time in question, Anderson was a prisoner in the custody and control of the Vermont Department of Corrections ("DOC"), incarcerated in a facility in Mason, Tennessee. On or about March 19, 2006, he informed the warden, defendant Warden Mills, that no air or heat was circulating in the cells. Anderson claims that he told Mills "that if he did not correct the problem that [Anderson] was going to make him." (Paper 4-1, Complaint, at 5). Warden Mills allegedly replied: "'Do what you want, we got something

for that.'" Id.

That same day, Anderson was stripped of his property, including his shoes, socks and bedding, after allegedly breaking his cell window. A disciplinary report was issued, and Anderson was "put on styrofoam trays." During the next seven days, two more windows and Anderson's light were "discovered broken." Id.

A disciplinary hearing was held, but Anderson was not allowed to attend due to his disruptive behavior. He was convicted "on all 6 offenses," and filed a disciplinary appeal. Id. at 6. He received the decision on his appeal on April 19, 2006. The decision allegedly failed to "acknowledge his central claim that of being denied the right to be heard" and limited the number of "existing claims the plaintiff can bring to [the warden's] attention." Id.

Anderson subsequently filed a second appeal, submitted grievances for the return of his property, and filed sick call slips due to the discomfort created by sleeping with no mattress or bedding. On May 11, 2006, having still not received his property, Anderson refused to leave the shower until his property was returned.

Defendant Captain Brooks proceeded to mace him, and two disciplinary reports were issued. Anderson remained in the shower through the night and into the next day, without medical attention.

Anderson now brings this action claiming cruel and unusual punishment in violation of the Eighth Amendment. He also alleges that he was punished without due process. For relief, he seeks a declaratory judgment, injunctive relief and monetary damages.

Anderson filed his complaint on July 21, 2006. On November 27, 2006 he moved for a change of venue, and on December 8, 2006 the defendants moved to dismiss. In a Report and Recommendation dated April 2, 2007, I recommended that defendants Gold and Flum be dismissed, and that the remainder of the case be transferred to the United States District Court for the Western District of Tennessee.

While my Report and Recommendation was pending, the defendants filed a second motion to dismiss seeking dismissal pursuant to Fed. R. Civ. P. 41(b). In this second motion, filed on April 16, 2007, the defendants reported that Anderson had been "released from prison 40

days ago, and has failed to provide the Court or Defendants with his new address.” (Paper 27-1 at 2). Arguing failure to prosecute, the defendants urged the Court to stay transfer of the case for 60 days, or until Anderson informed the Court of his new address. If Anderson failed to contact the Court within that 60-day period, the defendants argued that the case would be ripe for dismissal under Rule 41(b).

On April 17, 2007, the Report and Recommendation sent to Anderson’s last known address was returned as undeliverable. That same day, Court staff obtained a North Carolina address from the Department of Corrections and sent a copy of the Report and Recommendation to that address. To date, the Court has not received any objection to the initial Report and Recommendation.

On July 10, 2007, pursuant to an Order of the Court, the Clerk’s Office sent a copy of the defendants’ second motion to dismiss to the North Carolina address. The Court’s Order of July 10 warned Anderson that he needed to inform the Court of his intention to proceed within 30 days. The Court also allowed him 30 days in which to file any objections to the pending Report and

Recommendation and the defendants' second motion to dismiss. The Order stated that "[f]ailure to submit such filings may result in the dismissal of the case with prejudice." (Paper 29 at 3). Over 30 days have passed, and Anderson has not yet filed anything with the Court.

#### Discussion

Pursuant to Rule 41(b), a court may dismiss an action, on motion or on its own initiative, for the "failure of the plaintiff to prosecute or to comply with [the Federal Rules of Civil Procedure] or any order of court[.]" Fed. R. Civ. P. 41(b). Given the harsh nature of dismissals, such dismissals are "appropriate only in extreme circumstances." Lucas v. Miles, 84 F.3d 532, 535 (2d Cir. 1996). Furthermore, a court must be cognizant of the special latitude to be given to *pro se* litigants. Webb v. Bermudez, 1996 WL 599673, at \*1 (S.D.N.Y. Oct. 17, 1996) (citing Salahuddin v. Harris, 782 F.2d 1127, 1132 (1986)).

Nonetheless, the fact that Anderson is proceeding *pro se* does not mean that he can thwart the judicial process as he chooses. This Circuit has held that "while *pro se* litigants may in general deserve more lenient

treatment than those represented by counsel, all litigants, including *pro se*s, have an obligation to comply with court orders. When they flout that obligation they, like all litigants, must suffer the consequences of their actions.” McDonald v. Head Criminal Court Supervisor Officer, 850 F.2d 121, 124 (2d Cir. 1988).

In general, a determination of whether to dismiss for failure to prosecute involves a consideration of whether the plaintiff’s failure caused a delay of considerable duration; whether plaintiff was given notice that further delay would result in dismissal, and whether defendants will be prejudiced by further delay. United States ex rel. Drake v. Norden Sys., Inc ., 375 F.3d 248, 254 (2d Cir. 2004). The court must also carefully balance the need to alleviate court congestion with the plaintiff’s right to have his day in court, and must consider the efficacy of lesser sanctions. Id.

#### I. Duration of Failures

The relevant inquiry on this factor is twofold: (1) whether the plaintiff is at fault for failing to prosecute, and (2) whether the plaintiff’s failures were

of significant duration. See Norden Sys., Inc., 375 F.3d at 255. In this case, Anderson has not submitted anything to the Court in over eight months. His response to the defendants' first motion to dismiss was due more than seven months ago, and any objection to the Court's initial Report and Recommendation was due approximately four months ago. Although Anderson's failures may have been due, at least in part, to inaccurate mailing addresses, Anderson was obligated to inform the Court and the parties of any new address.

In its order granting Anderson's motion for leave to proceed *in forma pauperis*, the Court stated that "[e]ach party shall keep the Court apprised of a current address at all times while the action is pending. Notice of any change of address must be filed promptly with the Court and served on the parties." (Paper 3 at 3). Similarly, Local Rule 83.3(c) requires that "[a]n attorney or *pro se* party appearing before the court is under a continuing duty to notify the court of any change of address and telephone number." Anderson has clearly failed to comply with the Court's Order and its Local Rule.

Further, the case law in this Circuit indicates that



Anderson's failures have been of significant duration. See, e.g., Deptola v. Doe, 2005 WL 2483341, at \*2 (E.D.N.Y. Oct. 7, 2005) (dismissing case for failure to prosecute three months after *pro se* plaintiff failed to appear at a scheduling conference); Wilson v. Oxford Health Plans, Inc., 2002 WL 1770813, at \*2-4 (S.D.N.Y. July 31, 2002) (dismissing for failure to prosecute almost four months after plaintiff failed to respond to court's order); Lopez v. Catholic Charities of the Archdiocese of New York, 2001 WL 50896, at \*4 (S.D.N.Y. Jan. 22, 2001) (dismissing for failure to prosecute when plaintiff "ceased to prosecute . . . action at all" for three months). Accordingly, this factor weighs in favor of dismissal.

## II. Notice That Delays Could Result in Dismissal

The Second Circuit requires that the plaintiff receive adequate notice that the case could be dismissed due to inaction. See Martens v. Thomann, 273 F.3d 159, 180-81 (2d Cir. 2001). When the Court granted Anderson's motion for leave to proceed *in forma pauperis*, it provided a series of instructions as to how the case should proceed. (Paper 3). Specifically, the Court

notified Anderson that he

should always file a response to a motion by the defendants. In particular, in the event the defendants move for summary judgment as discussed above, or move to dismiss the complaint pursuant to Rule 12 of the Federal Rules of Civil Procedure, the plaintiff's failure to respond may result in the dismissal of the complaint.

Id. at 5-6. Also, in the Court's most recent Order (Paper 29), it clearly warned Anderson that failure to at least inform the Court of his intention to proceed might result in dismissal with prejudice. Therefore, Anderson has been duly warned of the potential for dismissal.

### III. Prejudice to Defendants

The third factor considers prejudice to the defendants. In deciding this factor, the Court must assess "whether defendants are 'likely to be prejudiced by further delay.'" Norden Sys., Inc., 375 F.3d at 256 (quoting Martens v. Thomann, 273 F.3d 159, 180 (2d Cir. 2001)). "Prejudice to defendants resulting from unreasonable delay may be presumed . . . but in cases where delay is more moderate or excusable, the need to show actual prejudice is proportionally greater." Lyell Theater Corp. v. Loews Corp., 682 F.2d 37, 43 (2d Cir. 1982) (citations omitted).

Here, the defendants have been forced to bear the expense of defending a lawsuit that Anderson may not wish to pursue. The prejudice thus far has been limited by the lack of activity in the case, although the defendants have been compelled to file two separate, and potentially dispositive, motions. If the Court decides not to dismiss the case, further delays will certainly add to the prejudice already suffered. Accordingly, this factor favors dismissal, albeit marginally.

#### IV. Balancing Interests

The fourth factor requires balancing Anderson's due process interests with the Court's congested docket. In deciding this factor, the Court must strike a "balance between district court calendar congestion and the plaintiff's right to an opportunity to be heard." Norden Sys., Inc., 375 F.3d at 257 (citing Martens, 273 F.3d at 182). The efficient administration of justice requires that a court effectively manage its docket, guaranteeing that its cases progress with appropriate speed. See Alevizopoulos v. Comcast, 2000 WL 1677984, at \*3 (S.D.N.Y. Nov. 8, 2000) (citing Lyell Theater, 682 F.2d at 42); see also Chira v. Lockheed Aircraft Corp., 634

F.2d 664, 668 (2d Cir. 1980) ("Burgeoning filings and crowded calendars have shorn courts of the luxury of tolerating procrastination.").

In this case, Anderson's failure to comply with the Court's Orders and Local Rules diminishes his right to have his claim heard. See Feurtado v. City of New York, 225 F.R.D. 474, 480 (S.D.N.Y. 2004) (citing Dodson v. Runyon, 957 F. Supp. 465, 470 (S.D.N.Y. 1997), aff'd, 152 F.3d 917 (2d Cir. 1998)). Because Anderson has made no effort to keep the Court and the parties apprised of his current address, and given his apparent apathy with respect to the defendants' call for dismissal, it is unfair to the other litigants to permit this suit to remain on the Court's docket indefinitely.

V. Consideration of Lesser Sanctions

The fifth and final factor the Court must consider in deciding whether to dismiss this case for failure to prosecute is "whether lesser sanctions would have been sufficient to remedy any prejudice resulting from plaintiff's delay." Norden Sys., Inc., 375 F.3d at 257 (citing Martens, 273 F.3d at 182). A plaintiff's repeated violation of court orders will lead a court to

"the inexorable conclusion" that dismissal is the only appropriate response to a plaintiff's conduct. Feurtado, 225 F.R.D. at 481 (citing Chira, 634 F.2d at 666); see also Smith v. Human Res. Admin. of New York City, 2000 WL 307367, at \*3 (S.D.N.Y. Mar. 24, 2000) (finding lesser sanctions inappropriate where plaintiff has ignored multiple court orders); Alevizopoulos, 2000 WL 1677984, at \*4 (same).

Here, the defendants have proposed a reasonable sanction. Specifically, they suggest that the Court adopt my initial Report and Recommendation, but stay the transfer of the case for 60 days. If Anderson does not contact the Court within that 60-day period and express his intent to proceed, the case should be dismissed. If Anderson does contact the Court, the case should be transferred to Tennessee, less defendants Gold and Flum. I recommend that the Court adopt this proposed sanction.

Anderson was released from prison approximately five months ago. After his release, the Department of Corrections provided the Court with an address in North Carolina. The Clerk's Office now informs the Court that Anderson may again be incarcerated in a local facility in

Vermont. This Report and Recommendation will be sent to Anderson's last known address. If Anderson fails to respond to the Court within 60 days, the Court should dismiss his claims with prejudice. If a response is received within 60 days, the Court should adopt my previous Report and Recommendation, dismiss defendants Gold and Flum, and transfer the remainder of the case to the Western District of Tennessee. If the case is either dismissed or transferred, counsel's pending motion to withdraw (Paper 27) should be GRANTED at that time.

#### Conclusion

For the reasons set forth above, I recommend that the defendants' motion to dismiss (Paper 27) be GRANTED, and that this case be dismissed if the plaintiff does not inform the Court within 60 days of his intent to proceed. If the plaintiff so contacts the Court within that 60 day period, defendants Gold and Flum should be dismissed and the case should be transferred to the United States District Court for the Western District of Tennessee pursuant to my first Report and Recommendation (Paper 26). If the case is either dismissed or transferred, counsel's pending motion to withdraw (Paper 27) should be

GRANTED at that time.

Dated at Burlington, in the District of Vermont,  
this 21<sup>st</sup> day of August, 2007.

/s/ Jerome J. Niedermeier

Jerome J. Niedermeier

United States Magistrate Judge

Any party may object to this Report and Recommendation within 10 days after service by filing with the clerk of the court and serving on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. Failure to file objections within the specified time waives the right to appeal the District Court's order. See Local Rules 72.1, 72.3 & 73.1; 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b), 6(a) and 6(e).